IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 192 OF 2006

IN

STAMP NUMBER MAIN NO. 652 OF 2006

SHRI PANDURANG H. TORASKAR, ...Applicant
BARDEZ, GOA.

Versus

MR. FRANCIS D'SOUZA AND 4 ORS., ...Respondents

Mr. Ajit Kantak,Advocate for the Applicant.
Mr. Arun Bras De Sa, Advocate for the Respondent.

Coram:- N. A. BRITTO, J.

Date:- 21st June, 2006

P.C.:-

Heard Mr. A. R. Kantak, the learned Counsel of the applicant and Mr. Arun Bras De Sa, the learned Counsel of the respondents.

The applicant herein is the complainant who has sought leave to appeal against the acquittal of the accused under Sections 447, 426, 427 r/w 34 I.P.C. by Judgment and Order dated 14-11-2005 of the learned J.M.F.C., Bicholim.

The complaint was filed by the applicant(complainant, for short) on 16-8-2000 against as many as 20 accused persons and in relation to 4 separate incidents which took place on 12-3-2000, 14-3-2000, 16-3-2000 and 19-3-2000. However, by Order dated 8-8-2000, the learned J.M.F.C. was pleased to order issue of process against A-1, A-2, A-3, A-5 and A-10 who were subsequently re-numbered as A-1 to A-5. It appears that earlier in respect of the first three incidents, complaints were filed with the Police which were treated as N.C. e.g. in respect of the first incident dated

12-3-2000 the N.C. complaint was filed by PW6/Laxman Kingley and as regards the incidents dated 14-3-2000 and 16-3-2000 the N.C. complaints were filed by the complainant himself. The first N.C.complaint filed by PW6/Laxman was registered under Sections 504, 323 I.P.C. The second N.C. filed by the complainant was registered under Sections 427, 504 I.P.C. and the third N.C. was also filed by the complainant and was registered under Sections 504, 427 I.P.C. The said incidents took place in relation to a property which is surveyed under no.514/1 in the name of the complainant and his wife and Manguesh Harmalker and Sheik Ismael Bepari and property surveyed under no.529/3 which is in the name of the Communidade and of which the complainant has been shown as a tenant. The pond referred to is surveyed under no.529/4 admittedly belongs to the Communidade but is within the property surveyed under No.529/3. Process was issued in respect of the said three incidents dated 12-3-2000, 14-3-2000 and 16-3-2000 under Sections 447, 426 and 427. Accused Nos.4 and 5 were tried in respect of the first incident of 12-3-2000 in relation to survey no.529/3 under Section 447 I.P.C. As regards the incident of 12-3-2000, A-4Uday and A-5/Zacarias were charged under Sections 447, 352 r/w 34 I.P.C. in relation to survey no.529/3. As regards the incident of 14-3-2000 A-1 to A-3 were charged under Sections 447, 426 r/w 34 I.P.C. in relation to survey no.514/1. As regards the incident of 15-3-2000, A-3 was charged under Sections 506(1) and 427 I.P.C. in relation to property 514/1. It may be noted here that the N.C. complaint filed by the complainant as regards this incident of 15-3-2000 on 16-3-2000 was only under Sections 504 and 427 I.P.C. and not under Section 506(1) I.P.C. The complainant examined himself and 2 of his sons, namely PW3/Gurudas and PW4/Rajendra and 3 of his labourers, namely PW2/Sunil, PW5/Bhiva and PW6/Laxman. PW7/Anthony and PW8/Atmaram are Police Officials. As far as the first N.C. complaint is concerned which was lodged by PW6/Laxman on 12-3-2000, the same was not supported by PW6/Laxman when he clearly stated that the facts recorded in the said N.C. complaint was narrated to the Police by the complainant which in a way reflects that he was acting not of his own but at the behest of the complainant. It appears that all the 3 labourers who

were examained in the case, namely PW2/Sunil, PW5/Bhiva and PW6/Laxman were the labourers of the complainant who were at the relevant time residing in one of the said two properties. It appears that there is a dispute between the complainant and the accused who are trying to assert a right to graze their cattle in relation to the property surveyed under no.514/1 and as regards which there are about 20 cases pending between some of the accused against whom the process was not issued.If the pond belonged to the Communidade where A-4/Uday and A-5/Zacarias were found fishing and others normally wash their clothes one fails to understand what right PW6/Laxman had to question them about the said fishing in a pond which admittedly does not belong to the complainant and belongs to the Communidade. As regards the first incident, the complainant alleged that PW6/Laxman had noticed that A-4/Uday and A-5/Zacarias had criminally trespassed into the property and were fishing in the pond and later removed raw mangoes from the trees and when questioned the said accused about the illegal fishing and removing the raw mangoes and at that time both the said accused, namely A-4/Uday and A-5/Zacarias threatened the said PW6/Laxman not to work for the complainant and assaulted the said PW6/Laxman with a stick and tore his clothes. It appears that the complainant or for that matter PW6/Laxman were unable to produce any medical evidence to support their allegation that PW6/Laxman was at all assaulted and the learned Magistrate has noted that if PW6/Laxman was assaulted with the stick, the description of the stick varies from witness to witness and no medical certificate was produced and in case PW6/Laxman was assaulted with a torny stick at least a small injury would have been found on him or the stick having a nail then he would certainly have sustained an injury. The evidence of the complainant itself has been found to be far from convincing as it was filled with material omissions which the learned Magistrate has taken note of in para 15 of the impugned Order. One may not be able to agree with each and every observation made by the learned J.M.F.C. in acquitting the accused under one or the other Sections for which they were charged but the fact remains that if the evidence of the complainant himself was found wanting in conviction there was no

question of any of the accused being convicted only because the sons of the complainant or for that matter the complainant's labourers put up a semblance of supporting the complainant. In fact, they did not. The tenor of the evidence of the complainant and his son PW3/Gurudas Toraskar is that on 12-3-2000 it is PW6/Laxman who had gone to the property and it appears that the complainant accompanied him at the time of filing the N.C. complaint only. If according to complaint on 12-3-2000 A-4/Uday and A-5/Zacarias had entered into the fishing pond, as per PW2/Sunil it is A-1/Francis and A-2/Annie who were fishing in the pond. It is surprising that A-2/Annie could fish in the pond and pluck raw mangoes, being a woman! PW6/Laxman has not supported the version of the complainant. His evidence gives an impression that all accused were present, for he has stated that he saw the accused for first time in the property Tolem, in village Tivim. Later he stated that A-4/Uday and A-5/Zacarias were fishing in the lake and there were two more persons with them, who were not before the Court. If the complainant was present, one fails to understand as to why a labourer like PW6/Laxman had to question them and if there were two more persons as to why the N.C. complaint was not filed against them. It appears that the alleged offences have taken place, if at all on account of the property dispute between the complainant and the accused including those against whom process was not issued. The case of the complainant certainly was not a case which was proved beyond reasonable doubt so as to invite a conviction against the accused. It is not a fit case to grant leave. The learned J.M.F.C. was right in acquitting the accused, may be for wrong reasons.

In the circumstances, the application is hereby dismissed.

N. A. BRITTO, J.

RD.